
(1917) 01 CAL CK 0052
In the Calcutta High Court

Subaj Mal Kharad

APPELLANT

Vs

Akshoy Kumar Roy Chowdhury and Another

RESPONDENT

Date of Decision : 10-01-1917

Acts Referred:

Calcutta Municipal Act, 1923 — Section 336
Civil Procedure Code, 1908 (CPC) — Section 91

Citation : (1917) 01 CAL CK 0052

Hon'ble Judges : Walmsley, J;D. Chatterjee, J

Bench : Division Bench

Judgement

Walmsley, J.

The suit from which this appeal arises was instituted by two Hindu gentlemen with the permission of the Advocate. General in regard to a piece of land which they described as a public highway, and the relief for which they asked is in the terms of form No. 31 in Appendix A of the Civil Procedure Code. The defendant, now appellant, is a Marwari who has built a temple on land immediately adjoining the strip which the plaintiffs say is a public highway.

2. The learned Subordinate Judge in the first Court found that the plaintiffs had proved their case, and granted them a decree, and this decision was confirmed by the learned District Judge in appeal.

3. The first argument pressed in support of the appeal is that the plaintiffs could not sue u/s 91, Civil Procedure Code, because the land lies within the area of the Calcutta Municipality and reference is made, to Section 336 of the Calcutta Municipal Act which declares that: "All public streets * * * including the soil * * * shall rest in and belong to the Corporation."

4. The defendant has no authority to quote in support of this argument and we have to read the two sections together, and consider whether Section 336 of Act III of 1899 imposes any limitation on Section 91, Civil Procedure Code. For my part I cannot see any, thing to suggest such a limitation. Section 91 of the CPC is

extremely broad in its terms, and if it had been intended to exclude from its scope cases in which a local authority, such as a Municipal Committee or a District Board, might be regarded as competent to safeguard the interests of the public it would have been very easy to insert words to that effect. As the section stands it does not matter where the alleged public nuisance is situated. Any two persons, provided they obtain the Advocate-General's consent in writing, may sue for its removal. Again the other section, Section 336 of the Calcutta Municipal Act, merely vests the proprietary right in the soil of highways in the Corporation: but it does not add that in case of obstruction the Corporation alone shall have the right to sue for the removal of the obstruction. In my opinion, therefore, there is no weight in this first argument.

5. Next it is urged that the dedication to the public use on which the plaintiffs rely is invalid, and this argument has several branches. It is said that the Courts below have not found when the dedication did take place, that the dedication cannot have been earlier than July 27th 1893 when a letter, Exhibit 6, was addressed to the Secretary of the Corporation by Buddh Singh, Bishan Chand and Budree Das, that in 1893 the signatories to that letter were incompetent to make the dedication because they had previously entered into an oral contract with the defendant's father respecting the land, and that in any case such dedication was invalid because there was no acceptance by the Corporation.

6. Lastly it was urged that the lower Courts were wrong in holding that the oral agreement set up by defendant was inoperative because it was not reduced to writing.

7. One of these points may be disposed of at once, that is the objection that acceptance by the Corporation was necessary to make the dedication operative. The learned Vakil can refer us to no authority for this proposition, while on the other hand, there is the statement in paragraph 43 of the Article on Highways in Lord Halsbury's Laws of England, Volume 16, that: "Acceptance by the public requires no formal act of adoption by any persons or authority but is to be inferred from public user of the way." It may be added here that although there was no formal acceptance the lower Courts have found that the lighting, repairing, watering and scavenging of the alleged highway was carried out by the Corporation.

8. Now let us turn to the time and fact of dedication. In this Court it is conceded that a letter in the terms of Exhibit 6 was written in July 1893 to the Secretary to the Corporation. That letter speaks of the road as having been used by the public for about six years. The learned Subordinate Judge does not record an exact finding as to the year in which the public began to use the strip of land, but he points out that one of the two highways which it connects was constructed in 1886. The lower Appellate Court, however, records very clear findings on this point: and says more than once that the public began to use the land as a passage in about 1887. Paragraphs 51 and 52 of the Article already mentioned deal with user as evidence of dedication. On the definite finding of user since

1857, I do not think that the dedication must be regarded as made in July 1893 when the letter Exhibit 6 was written. Without that letter the evidence of user since 1887 is enough to justify the inference of a dedication in 1887, and the letter with its reference to six years" user corroborates that evidence. It must be remembered that the defendant offers no evidence to rebut the inference, but contents himself with pleading that certainly before 1893 possibly before 1887, the signatories had parted with their rights in the land.

9. The remaining question, therefore, relates to this alleged agreement of 1887 or thereabouts. The evidence of this alleged agreement is to be found in Exhibit D, a deed of gift executed in 1911 by Budh Singh and the son of Bishan Chand in favour of the defendant. Regarding this document and its allegation of a previous agreement, the learned District Judge holds that Exhibit C is not operative because the signatures of the executants have not been properly attested, that the alleged gift could not be made except by a registered document, and that by the very words of Exhibit C, the ownership of the land remained with the executants up to 1911. The first of these objections is fatal: one executant signed the document at Calcutta and the other at Azimganj and one witness only attested each signature. The third objection is equally fatal to the defendant's assertion that the dedicators were not competent to dedicate, for they say in the document that they are in possession and this is borne out, as the lower Court's remark, by their possession of the title-deeds. In regard to the second objection the learned Vakil has urged that there was a sort of exchange between the parties in 1887 and that no document was necessary. But this attitude is inconsistent with Exhibit D for the executants convey the property by way of free gift.- If the appellant received the property by way of free gift in 1911, it is clear that there can have been no operative agreement concluded in 1887.

10. In my opinion none of the arguments put forward on behalf of the appellant has any substance and I think that the appeal should be dismissed with costs.

D. Chatterjee, J.

11. I agree.